

ARKANSAS COURT OF APPEALS

DIVISION II

No. CA08-655

STEPPING STONE SCHOOL and AIG
CLAIM SERVICES, INC.

APPELLANTS

V.

LISA FERRARI and SECOND INJURY
FUND

APPELLEES

Opinion Delivered January 28, 2009

APPEAL FROM THE ARKANSAS
WORKERS' COMPENSATION
COMMISSION
[NO. F610765]

AFFIRMED

M. MICHAEL KINARD, Judge

Stepping Stone School and AIG Claim Services, Inc. appeal the decision of the Workers' Compensation Commission finding that Lisa Ferrari is entitled to permanent partial disability benefits in excess of her degree of permanent impairment in the amount of ten percent rated to the body as a whole and finding that the Second Injury Fund has no liability in this matter. We affirm.

Appellants' sole point on appeal is that the decision of the Commission is not supported by substantial evidence. In reviewing decisions from the Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings and we affirm those findings if they are supported by substantial evidence. *Morales v. Martinez*, 88 Ark. App. 274, 198 S.W.3d 134 (2004). Substantial evidence is evidence which a reasonable person might accept as adequate to support a conclusion. *Id.*

Ferrari sustained an admittedly compensable injury to her back on September 20, 2006. At the time of her injury, Ferrari was earning \$10.41 per hour. Ferrari was assigned a seven percent impairment rating and given a permanent weight lifting restriction of twenty-five pounds. After her employment with Stepping Stone was terminated, she went to work for a trucking company earning \$10.00 per hour.

Ferrari sustained a previous back injury in 1999 while working for a different employer. She received a permanent impairment rating for that injury. Ferrari received no permanent work restrictions due to the 1999 injury and was able to resume her pre-injury employment following that injury.

Stepping Stone argues that the Commission's award of permanent partial disability benefits due to wage-loss is not supported by substantial evidence. We disagree. Wage-loss is the extent to which a compensable injury has affected a claimant's ability to earn a livelihood. *Emerson Elec. v. Gaston*, 75 Ark. App. 232, 58 S.W.3d 848 (2001). When a claimant has an impairment rating to the body as a whole, the Commission has the authority to increase the disability rating based upon wage-loss factors. *Lee v. Alcoa Extrusion, Inc.*, 89 Ark. App. 228, 201 S.W.3d. 449 (2005). The Commission is charged with the duty of determining disability based upon a consideration of medical evidence and other factors affecting wage-loss such as the claimant's age, education, and work experience. *Id.* In addition, a claimant's motivation to work, post- injury income, credibility, and demeanor may be considered by the Commission in determining wage-loss. *Henson v. Gen. Elec.*, 99 Ark. App. 129, 257 S.W.3d 908 (2008).

The evidence in this case established that Ferrari was forty-one years old and had the equivalent of a high school education at the time of her injury. In addition to being unable to perform her duties at Stepping Stone due to her injury, the Commission determined that she was also unable to pursue her concurrent employment with a different employer due to the injury. The Commission determined that Ferrari was highly motivated to work. After reviewing Ferrari's past work history and her restrictions due to her 2006 injury, the Commission determined that the positions for which she would be qualified are lower paying positions that exist in fewer numbers than other positions. The Commission may use its superior knowledge of industrial demands, limitations and requirements in conjunction with wage-loss evidence to determine disability. *Henson, supra*.

Appellants argue that Ferrari should be barred from recovering wage-loss benefits pursuant to Ark. Code Ann. § 11-9-522(b)(2) (Repl. 2002), which states:

However, so long as an employee, subsequent to his injury, has returned to work, has obtained other employment, or has a bona fide and reasonably obtainable offer to be employed at wages equal to or greater than his average weekly wage at the time of the accident, he shall not be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment established by a preponderance of the medical testimony and evidence.

Pursuant to Ark. Code Ann. § 11-9-704(c)(3) (Repl. 2002), the provisions of the Arkansas Workers' Compensation Act are to be strictly construed. A strict construction of Ark. Code Ann. § 11-9-522(b)(2), as was applied by the Commission in its opinion, reveals that the statute simply requires the injured employee's post-injury wages to be lower than his or her pre-injury wages. The statute does not require the employee's post-injury wages to be a certain amount lower than his or her pre-injury wages. In this case, Ferrari returned to work

at wages that were lower than her pre-injury wages. Also, there is no evidence that she received a “bona fide and reasonably obtainable offer” of employment paying the same or more than her pre-injury wage. Therefore, Ferrari is not barred from receiving wage-loss benefits pursuant to Ark. Code Ann. § 11-9-522(b)(2).

Appellants also argue that the Second Injury Fund should be responsible for any wage-loss benefits. Under Ark. Code Ann. § 11-9-525(b)(3) (Supp. 2007), three requirements must be met in order for the Second Injury Fund to have liability for wage-loss benefits. First, a claimant must have had some degree of permanent partial disability or impairment prior to sustaining a compensable injury. Second, the claimant must have sustained a compensable injury that resulted in additional permanent partial disability or impairment. Third, there must be a combined degree of disability or impairment from the two injuries that is greater than the disability or impairment caused by the second injury alone.

In this case, it is clear that the first and second conditions have been satisfied due to Ferrari’s 1999 back injury and subsequent permanent impairment rating. The Commission found that the Second Injury Fund did not have any liability because the third condition was not satisfied. The evidence established that after Ferrari’s 1999 injury she received no permanent work restrictions and was able to resume her pre-injury employment. Any negative impact upon her ability to earn a livelihood is solely due to the 2006 compensable injury she sustained while working for Stepping Stone. Therefore, the Commission’s decision to deny Second Injury Fund liability is supported by substantial evidence.

Affirmed.

GLOVER and MARSHALL, JJ., agree.